Supreme Court, U. S.
FILED
DEC 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL BANK OF JACKSON,
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MILES CURTISS MCKEE
DALTON MCBEE, JR.

FUSELIER, OTT, MCKEE
& MOELLER, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

(601) 948-2226

Counsel for Petitioner

QUESTION PRESENTED

Whether an employer may defend a § 706 Title VII action by the Equal Employment Opportunity Commission by showing that the jurisdictional prerequisites to suit were obtained by fraud?

TABLE OF CONTENTS

	Page
Table of Cases and Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	10
Appendix A (Opinion of the Court of Appeals)	1a
Appendix B (Judgment of the District Court)	9a
Appendix C (Order denying Petition for Rehearing and Rehearing En Banc)	15a
Appendix D (Petitioner's Answer, Affirmative Defenses and Counterclaim)	17a

TABLE OF CASES AND AUTHORITIES

	Page
Albermarle Paper Company v. Moody, 422 U.S. 405 (1975)	5,7
American Propeller and Mfg. Co. v. United States, 300 U.S. 475 (1937)	5
Bull v. United States, 295 U.S. 247 (1935)	6
Christiansburg Garment Co. v. EEOC, 432 U.S. 412 (1978)	8
Conley v. Gibson, 355 U.S. 41 (1957)	7
DuShane v. Benedict, 120 U.S. 630 (1887)	6
EEOC v. Brookhaven Bank & Trust Co., 614 F.2d 1022 (5th Cir. 1980)	8
Frederick v. United States, 386 F.2d 481 (5th Cir. 1967)	9
General Telephone Co. v. EEOC, 100 S. Ct. 1698 (1980)	6,8
Hickman v. Taylor, 329 U.S. 495 (1947)	7
Lacy v. United States, 216 F.2d 233 (5th Cir. 1954)	9
Luckenbach SS Co. v. The Thekla, 266 U.S. 328 (1924)	5,6
National Hockey League v. Metropolitan Hockey League, 427 U.S. 639 (1976)	8
Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977)	5,7,8
Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978)	7,8
Pennsylvania RR Co. v. Miller, 124 F.2d 160, 162 (5th Cir. 1941)	9

	Page
Roadway Express, Inc. v. Piper, 100 S. Ct. 2455 (1980)	8
Rothensies v. Electric Storage Batteries, 329 U.S. 296 (1946)	6
Smith v. Sperling, 354 U.S. 91 (1957)	7
Stone v. White, 301 U.S. 532 (1937)	7
The Steamer "Siren" and Cargo v. United States, 74 U.S. (7 Wall.) 152 (1869)	5
United States v. Bramblett, 348 U.S. 503 (1955)	8
United States v. Detroit Timber and Lumber Co., 200 U.S. 321 (1906)	6
United States v. First National City Bank, 379 U.S. 378 (1965)	6
United States v. Industrial Crane & Mfg. Corp., 492 F.2d 772 (5th Cir. 1974)	9
United States v. McDaniel, 32 U.S. (7 Pet.) 1 (1833)	5
United States v. Paddock, 187 F.2d 271 (5th Cir. 1951)	9
United States v. Ringgold, 33 U.S. (8 Pet.) 150 (1834)	5
United States v. Shaw, 309 U.S. 495 (1940)	7
United States v. State National Bank, 96 U.S. 30 (1878)	6
Virginian R. Co. v. System Federation, 300 U.S. 515 (1937)	6
STATUTES	
18 U.S.C. § 1001	8
42 U.S.C. § 2000e-5	2
OTHER AUTHORITY	
Fed.R.Civ.P. 8(f)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

FIRST NATIONAL BANK OF JACKSON,
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

First National Bank of Jackson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 614 F.2d 1004 (5th Cir. 1980). The opinion and judgment of the district court (Appendix B, *infra*) are reported at 22 Fair Empl. Prac. Cas. 694 (S.D. Miss. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1980. A timely Petition for Rehearing and Rehearing *En Banc* was denied on September 12, 1980 (Appendix C, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 provides in part:

> (b) Whenever a charge is filed . . . , the Commission . . . shall make an investigation thereof. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.
>
> . . .
>
> (f)(1) If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . named in the charge.

STATEMENT

A. Facts

In response to EEOC's § 706 complaint, the petitioner pled, *inter alia*, that the suit and the underlying charge had been fraudulently filed and processed pursuant to a conspiracy among the EEOC, certain EEOC employees and

the charging party, George Brister. The bank, in formulating its affirmative defenses and counterclaim (Appendix D), relied on evidence that Brister: (1) had filed at least 45 EEOC charges against various employers within the jurisdiction of the Jackson office of the EEOC; (2) had recovered in excess of $13,000 as a result of such charges; (3) had no *bona fide* interest in employment with the employers so charged; (4) had, within a nine months period, filed at least five private lawsuits in the United States District Court before three separate judges; (5) was assisted in the filing of such suits by a lawyer employed by the local office of the EEOC; (6) invoked the Fifth Amendment privilege against self-incrimination in one of these suits when asked by a district judge, on hearing on a motion to appoint counsel for Brister, how many charges he (Brister) had filed; and (7) had failed to appear for trial.

In the proceedings *sub judice*, Brister, whose deposition was being taken at the instance of the EEOC, answered EEOC's questions, but, after only a few questions, refused to answer further questions by the bank's counsel and walked out of the deposition. The EEOC has never denied the truth of any of these facts.

The bank attempted discovery on the merits of the action, its affirmative defenses and counterclaim. The EEOC refused any discovery on the subject matter of the affirmative defenses or counterclaim. It made three unsuccessful attempts to have the counterclaim dismissed; never attacking the affirmative defense. Finally, the district court, through a United States Magistrate, ordered[1] full discovery on the allegations of the complaint,

---

[1] The Magistrate's order provided in pertinent part:

"In prior proceedings Plaintiff EEOC moved the District Court to dismiss the Counterclaim which Motion was denied. Consequently, the Counterclaim and

(*footnote continues*)

the affirmative defenses and counterclaim. The EEOC did not appeal the magistrate's order to the district judge as required by local rules.

The EEOC refused to allow the discovery ordered by the court.

B. The Decision Of The District Court

The district court, considering the defenses of the bank as matters in recoupment, and finding that the EEOC had been guilty of "recalcitrant action" and had "persistently neglected" to permit discovery of "relevant information", dismissed the cause. (Appendix B, p. 10a-11a).

C. The Decision Of The Court Of Appeals

The Fifth Circuit reversed and remanded, holding that the bank could not counterclaim or defend in equitable recoupment by a showing that the jurisdictional prerequisites to the suit of the EEOC were obtained maliciously, fraudulently and as a part of an unlawful conspiracy. The Court of Appeals, admitting that the bank's defenses had "some connection" to the EEOC suit, deemed that connection as being "too tenuous and indirect to warrant the innovation of the doctrine of recoupment." (App. A, p. 5a.)

(*footnote continued*)

> Affirmative Defenses asserted by the Defendant stand as viable pleadings and the Defendant is entitled to full discovery upon these issues . . . .
>
> The Defendant is entitled to liberal discovery in connection with the allegations of the Complaint, Defendant's Answer, Affirmative Defenses and Counterclaim, and, to that end, it is the opinion of this Court that the Plaintiff's Motion for a Protective Order should be overruled and the Defendant's Motion to Compel Discovery sustained."

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With The Decisions Of The Supreme Court.

Confronted with a fraudulently conceived and maintained action, the bank pled facts in its possession and sought relief in equity. The decision of the Court of Appeals prohibits the bank from pleading, discovering, and proving these facts. Egregious agency conduct, thus, is beyond the reach of the trial court's equity powers. Such conduct, in the Court of Appeals' view, could not serve as the foundation for any equitable relief because it did not "relate to the primary issue in this Title VII action—whether the bank unlawfully discriminated ...." (App. A, p. 6a).

Whether brought by the EEOC or a private plaintiff, Title VII actions are equitable in nature. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Court of Appeals' decision in this cause conflicts with *Occidental Life's* holding that a trial court may restrict or deny backpay relief because of the EEOC's "unexcused conduct of a particular case." 432 U.S. at 373.

The doctrine of equitable recoupment has long been acknowledged and accepted by this court. *American Propeller & Manufacturing Co. v. United States*, 300 U.S. 475 (1937); *Luckenbach SS Co. v. The Thekla*, 266 U.S. 328 (1924); *United States v. McDaniel*, 32 U.S. (7 Pet.) 1 (1833). Equitable recoupment may be pled as a defense to a claim by the United States. *The Steamer "Siren" and Cargo v. United States*, 74 U.S. (7 Wall.) 152, 154 (1869); *United States v. Ringgold*, 33 U.S. (8 Pet.) 150, 163 (1834). This court has consistently adhered to the principle that, "when the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard

to the subject matter." *The Thekla*, 266 U.S. at 339-340. The sovereign's "absence of legal liability . . . does not destroy the justice of a claim against it." *Id.* The fraud of an agent of the United States provides a proper basis for equitable recoupment. *United States v. State National Bank*, 96 U.S. 30, 36 (1878).

That the EEOC sues in the "public interest"[2] increases, rather than diminishes, the measure of equity available to gauge the *bona fides* of agency action. *United States v. First National City Bank*, 379 U.S. 378, 383 (1965); *Virginian R. Co. v. System Federation*, 300 U.S. 515, 552 (1937). Moreover, equity exists independently of, and anterior to, all congressional legislation. *United States v. Detroit Timber & Lumber Co.* 200 U.S. 321, 339 (1906).

The Court of Appeals' narrow view of the bank's pleadings and equitable defenses, with the resultant restriction of discovery, is inimical not only to the bank but to the "public interest" as well. The bank's defense should not have been limited to the precise confines of the EEOC's claim, so long as the defense arose out of "some feature of the transaction" upon which the EEOC's action was grounded. *Bull v. United States*, 295 U.S. 247, 262 (1935). A transaction which is the subject of a suit by the EEOC should be examined in all of its aspects and judgment rendered that does justice in view of the entire transaction as a whole. *Rothensies v. Electric Storage Batteries*, 329 U.S. 296, 299 (1946).

The bank should have been permitted to avail itself of any evidence tending to show that the claim of the EEOC was founded on a deliberately fradulent scheme and was worth less than it was asserted to be. *DuShane v. Benedict*, 120 U.S. 630, 648 (1887). Since the EEOC's claims are measured by equitable standards, it is open to the bank to show, by equitable standards, any fact which would deny

---

[2] *E.g., General Telephone Co. v. EEOC*, 100 S.Ct. 1698, 1704 (1980).

those claims. *Stone v. White*, 301 U.S. 532, 535 (1937). In recoupment, where the equities of the defendant outweigh those in favor of the government, the remedy is the dismissal of the government's claim. *United States v. Shaw*, 309 U.S. 495, 504 (1940). If laches[3] and "prejudicial trial conduct"[4] are within the bounds of "unexcused conduct" sufficient to defeat or diminish a Title VII claim, the collusive creation of federal court jurisdiction[5] is, *a fortiori*, available as an equitable defense.

Though the bank's claims might have failed on the merits, their rejection by the appellate court on the basis of a restrictive construction of bare pleadings, with discovery incomplete, and without any facts to support its finding that the defense was "too tenuous", is antagonistic to the basic precepts of modern pleading. *E.g., Conley v. Gibson*, 355 U.S. 41 (1957); Fed.R.Civ.P. 8(f). In any event, pleadings do not delimit discovery. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *Hickman v. Taylor*, 329 U.S. 495, 500-501 (1947). The Court of Appeals' holding effectively forecloses a full development of the "variety of fact-oriented issues," which are likely to occur during this litigation, whether those issues are

---

[3] *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 373 (1977).

[4] *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424-425 (1975).

[5] In a statutory, rather than equitable context, this Court has held that collusion to create federal jurisdiction may always be shown. *Smith v. Sperling*, 354 U.S. 91 (1957).

related to the merits,[6] or not.[7] *Oppenheimer*, 437 U.S. at 351. Such an intrusion into a trial court's broad discretion in discovery matters is impermissible. *National Hockey League v. Metropolitan Hockey League*, 427 U.S. 639 (1976).

The Court of Appeals' decision, if allowed to stand, would insulate malevolent agency action from detection and deterrence by precluding an equitable inquiry into the *mala fides* of such action. The decision stands for the proposition that the allegations of the bank's defenses, even if completely proven, are totally devoid of legal consequence. Such a result does not comport with the spirit of equity or the wishes of Congress.[8] Given the immunity of the sovereign, equity is the only mechanism available to citizens to protect themselves from covert, corrupt, conspiratorial and malignant governmental action.

---

[6] The facts contained in Brister's EEOC files, sought by petitioner, would clearly be relevant to the merits of other affirmative defenses interposed by the bank, including the bank's allegations that there was no reasonable investigation of the charge and no good-faith conciliation. *See General Telephone Co. v. EEOC*, 100 S.Ct. 1698, 1706, 1708 (1980); *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 368 (1977); *EEOC v. Brookhaven Bank & Trust Co.*, 614 F.2d 1022, 1026 (5th Cir. 1980) (Reavley, J., dissenting).

[7] There can be no doubt that the EEOC's course of dealing with Brister would be pertinent to the court's determination of whether the suit was brought in good faith and an award of attorneys' fees against the EEOC is warranted. *Roadway Express, Inc. v. Piper*, 100 S.Ct. 2455 (1980); *Christiansburg Garment Co. v. EEOC*, 432 U.S. 412 (1978). In addition, the 45 investigative files may contain impeachment matter should Brister and EEOC investigative officials testify at trial, or should EEOC documents be offered in evidence.

[8] 18 U.S.C. § 1001 renders elements of the conduct described by the defenses, if true, criminal. *See also United States v. Bramblett*, 348 U.S. 503 (1955).

B. The Decision Below Conflicts With Prior Decisions Of The Court of Appeals.

The instant decision conflicts with prior cases of the Fifth Circuit Court of Appeals: *Pennsylvania R.R. Co. v. Miller*, 124 F.2d 160, 162 (5th Cir. 1941) ("recoupment goes to the foundation of the plaintiff's claim; it is available as a defense. . . ."); *United States v. Paddock*, 187 F.2d 271, 277 (5th Cir. 1951) ("when a sovereign comes into court as a litigant, it is governed by the same principles of law that are applicable to ordinary persons . . . ."); *Lacy v. United States*, 216 F.2d 223, 225 (5th Cir. 1954) ("The government when applying for relief in a court of equity, is as much bound to do equity as is a private litigant"); *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967) (" when the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment . . ."); and, *United States v. Industrial Crane & Mfg. Corp.*, 492 F.2d 772, 774 (5th Cir. 1974) ("... appellant's claim sounded in recoupment, ... and by filing suit the government waived immunity to the extent of defeating its claim.").

CONCLUSION

Therefore, petitioner respectfully requests that this Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MILES CURTISS MCKEE
DALTON MCBEE, JR.

FUSELIER, OTT, MCKEE & MOELLER, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

(601) 948-2226

Counsel for Petitioner

Appendices

Appendix A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,
v.

FIRST NATIONAL BANK OF JACKSON, Defendant-Appellee.

No. 78-1357.

United States Court of Appeals,
Fifth Circuit.

April 2, 1980.

Mary Helen Mautner, Lutz Alexander Prager, Susan Buckingham Reilly, Attys., Washington, D. C., for plaintiff-appellant.

Fuselier, Ott, McKee & Flowers, M. Curtiss McKee, Armin J. Moeller, Jr., Jackson, Miss., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before MORGAN, REAVLEY and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

This appeal raises the question of whether an employer charged with discrimination in a Title VII action may counterclaim or present affirmative defenses sounding in tort. We reverse, holding that such an employer may not counterclaim or defend based on tort claims.

Appellant, Equal Employment Opportunity Commission, brought this suit in 1975 after its investigation of a charge of discrimination filed by George Brister, a black man. The EEOC determined that there was reasonable

cause to believe that the bank had discriminated against blacks and black males, but not against Brister individually. The EEOC brought suit under §706(b) of Title VII. Appellee, First National Bank of Jackson, filed an answer, including affirmative defenses and a counterclaim. The bank asserted that the suit was maliciously brought, in conspiracy with Brister, whom the district court described as a "chronic complainer."[1] In connection with the responsive pleadings, the bank sought discovery regarding information about Brister, which is allegedly contained in approximately 45 different investigative files of the Jackson District Office of the EEOC concerning approximately 45 charges brought by Brister against other employers. When EEOC failed to comply with this discovery request, in contravention of an order by a United States Magistrate, the district court dismissed the action with prejudice and awarded attorney's fees and costs to the bank.

The district court held that the bank's counterclaim, which was in the nature of a charge of malicious prosecution, was authorized pursuant to the Federal Tort Claims Act. The district court ruled that the Federal Tort Claims Act constituted a waiver of sovereign immunity. The trial court also stated that the claims were actually recoupments, and were compulsory under the Federal Rules of Civil Procedure.

[1] The primary issue in this case is whether the trial court abused its discretion in dismissing the appellant's suit as a discovery sanction.

Rule 37 of the Federal Rules of Civil Procedure provides trial courts with the means and power to enforce

---

[1] The defendant has not asserted its right to private conciliation. Our decision in *EEOC v. Brookhaven*, 5 Cir. 1979, 614 F.2d 1022 is controlling.

compliance with the rules of discovery through a broad choice of remedies and penalties.[2]

In *Emerick v. Fenick Industries*, 539 F.2d 1379, 1381 (5th Cir. 1976), this court stated:

> The discretion of the district court to order sanctions under Rule 37(b)(2) is broad but not unlimited. The due process clause of the fifth amendment limits the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). When the disobedient party is a plaintiff, dismissal with prejudice is a sanction of last resort, applicable only in extreme circumstances. *Thomas v. United States*, 531 F.2d 746, 749 (5th Cir. 1976); *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118 (5th Cir. 1967). When the disobedient party shows that his recalcitrance was based on factors beyond his control or on the exercise of constitutional privilege, a reviewing court is justified in terming the dismissal an abuse of discretion. *See Thomas v. United States*, supra; *Dorsey v. Academy Moving & Storage*, 423 F.2d 858, 861 (5th Cir. 1970). (footnote omitted)

539 F.2d at 1381.

In reviewing the trial court's actions, we are mindful that if the disputed information was not properly discoverable,

---

[2] Fed.R.Civ.P. 37(b)(2) provides in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

> (b)(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . .

it follows that the district court should not have imposed a Rule 37 sanction upon appellant for refusing to reveal the information. *Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974).

The district court's compelling discovery was founded on the premise that the counterclaim was viable. We do not agree. The district court's view that the bank's counterclaim was authorized by the Federal Tort Claims Act is erroneous. That the bank's counterclaim sounded in malicious prosecution was not contested by either of the parties.[3] The bank charged that the purpose of the EEOC's lawsuit was to "defraud, vex, and harass" the bank and other employers "maliciously and for ulterior purposes" by means of "unlawfully conceived, groundless, vexatious, and fraudulent charges."

[2,3] The United States cannot be sued unless it specifically consents to be sued, either by specific statutory consent, *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940), or by instituting a suit as to which a defendant may plead matters in recoupment. *Frederick v. United States*, 386 F.2d 481 (5th Cir. 1967). While the Federal Tort Claims Act waives immunity as to certain types of tort claims against the United States, the bank's claims fall squarely within the Act's express exceptions. By its own terms, the Federal Tort Claims Act does not apply to "[a]ny claim arising out of . . . false imprisonment, false arrest, malicious prosecution [or] abuse of process. . . ." 28 U.S.C. § 2680(h).

[4] The bank's assertion that the proviso in § 2680(h) which deletes the exception for investigative or law

---

[3] A malicious prosecution is defined as "one that is begun in malice, without probable cause to believe it can succeed, and that finally ends in failure .... The gist of the action is the putting of legal process in force regularly for the mere purpose of vexation or injury." 52 Am.Jur.2d § 2 at 187.

enforcement officers is applicable to the EEOC is without merit. Investigative or law enforcement officers are defined in § 2680(h) as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law." Under § 709(e) of Title VII, the EEOC's agents are given the power to: "at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [the Act]." They are not, however, given authority to execute searches, seize evidence, or make arrests for violation of federal law. The bank has not cited any authoritative interpretation of the meaning of "investigative or law enforcement officers" which would cause this court to reject the plain meaning given to these terms by the statutory definition itself. *See Caruth v. United States*, 566 F.2d 901 (5th Cir. 1978).

[5-7] The district court's ruling that the counterclaim was maintainable in recoupment is also erroneous. To state a claim in recoupment, a counterclaim must assert a claim arising out of the same transaction or occurrence which is the subject matter of the government's suit and seek relief only to the extent of diminishing or defeating the government's recovery. *Frederick v. United States*, 386 F.2d 481 (5 Cir. 1967). "A defendant's claim arising out of the same transaction or occurrence as that on which the plaintiff seeks recovery may be recouped, but there can be no recoupment if the damages claimed by the defendant arise from the breach of an independent contract or from an independent wrong unconnected with the plaintiff's cause of action. . ." 20 Am.Jur.2d § 69. Although the bank's counterclaim has some connection to the EEOC's suit, we deem that connection as being too tenuous and indirect to warrant the innovation of the doctrine of recoupment. Indeed, it is only where the plaintiff has no

valid claim that a defendant may maintain a suit for malicious prosecution. 52 Am.Jur. § 29.

[8-11] The bank's charge of harassment by appellant cannot be considered an affirmative defense. *Assuming* that the bank's allegations of malicious prosecution are meritorious, they could not constitute an affirmative defense to alleged Title VII violations. An affirmative defense is not valid if it appears to a certainty that the plaintiff would succeed despite any set of facts which could be proved in support of the defense. 2A Moore's Federal Practice ¶ 8.27[3], at 8251 (2d Ed. 1979). The so-called affirmative defense of malicious prosecution and harassment did not relate to the primary issue in this Title VII action—whether the bank unlawfully discriminated against blacks and black males. What constitutes an insufficient defense depends upon the nature of the claim for relief and the defense in question. Federal Practice and Procedure, Wright and Miller, Vol. 5, Section 1381, p. 791. We hold that the bank's affirmative defense of malicious prosecution is insufficient as a matter of law and, therefore, must be stricken. Rule 12(f), Fed.R.Civ.P.

[12,13] Because we hold that the district court should not have dismissed this cause, we must necessarily reverse the award of attorney's fees and costs. A district court may only award attorney's fees and costs to a prevailing Title VII defendant, pursuant to § 706(k) of the Act. 42 U.S.C. § 2000e-5(k); *see also, Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

[14] We hold that because the counterclaim was not properly maintainable against the EEOC, the district court abused its discretion in dismissing the suit as a discovery sanction. Further, the matters asserted in the counterclaim were not in the nature of an affirmative defense to the charge filed by the EEOC.

Accordingly, this case is REVERSED and REMANDED.

REAVLEY, Circuit Judge, concurring:

I agree that the judgment of the district court must be reversed because the discovery sanction was improper. I do not join in the dictum in the first footnote of the majority opinion.

The first footnote portends a departure from the statutory language of section 706 of Title VII. The majority indicates that *EEOC v. Brookhaven Bank and Trust Co.*, 614 F.2d 1022 (5th Cir. April 2, 1980), precludes the employer from asserting, on remand, that the failure of the EEOC to attempt informal methods of resolution must abate the present suit. I do not understand that case to stand for the asserted proposition. Rather, the issue in *Brookhaven Bank* is whether the EEOC can institute suit on alleged unlawful employment practices discovered in the course of investigating a charge that does not result in a reasonable cause finding. The right to conciliation was not raised. However, one of the policies the majority in *Brookhaven Bank* found to support its holding was that "employers should have the opportunity to settle with the EEOC and all aggrieved parties before court action is initiated." *Brookhaven Bank & Trust Co.*, 614 F.2d at 1025. Somehow, the employer now loses that right.

It cannot be argued that the employer has waived his right to assert the failure to attempt conciliation as an abatement to this suit. As the majority points out, the action was dismissed as a discovery sanction in its embryonic stage. The employer may well have wished to amend his answer when discovery is completed.

Subsection (f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976), makes it unmistakably clear that a failure of conciliation efforts is an absolute prerequisite to suit by the EEOC. The first footnote in the majority opinion ignores this language. Congress clearly intended for the EEOC to attempt

informal methods of resolution before bringing the grievance before the federal courts. The duty should not be lightly cast aside. Moreover, when the suggestion in the first footnote is juxtaposed with the majority's holding in *Brookhaven Bank*, much of the statutory paradigm of section 706 is emasculated. The two can be read in concert to mean that the EEOC can file suit on alleged unlawful employment practices despite the lack of any reasonable cause finding and despite the fact that the EEOC makes no attempt at conciliation. I cannot agree.

Appendix B

EEOC v. FIRST NATL. BANK OF JACKSON

U.S. District Court,
Southern District of Mississippi

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. FIRST NATIONAL BANK OF JACKSON; SAME v. BROOKHAVEN BANK TRUST COMPANY, Nos. J75-278(C) and J76-275(C). November 29, 1977; Final Judgment of Dismissal December 7, 1977

CIVIL RIGHTS ACT OF 1964
Discovery against EEOC—Sanctions
108.8155

EEOC's failure to answer bank's interrogatories concerning the approximately 45 charges filed by certain individual requires dismissal of EEOC's action against bank.

Action under Title VII of Civil Rights Act of 1964 by EEOC against employer, which moved for dismissal or, in the alternative, for summary judgment. Action dismissed.

See also 22 FEP Cases 693.

Abner W. Sibal, General Counsel, William L. Robinson, Associate General Counsel, and Earl Harper, Jr., Acting Assistant General Counsel, Donald L. Hollowell, Roger J. Martinson, and Maureen G. Malone (Atlanta Regional Office of General Counsel), for plaintiff.

M. Curtiss McKee and Armin J. Moeller, Jr. (Fuselier, Ott, McKee & Flowers), Jackson, Miss., for defendant.

Full Text of Opinion

COX, District Judge:—In each of these consolidated suits, significantly, as plaintiffs aver that it "is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action" by an Act of Congress. The suit against the First National Bank of Jackson was filed in this Court on September 29, 1975. The suit against the Brookhaven Bank and Trust Company was filed in this Court on September 16, 1976.

These suits have in the interim been in the process of such limited discovery as has been voluntarily afforded them by the plaintiff. These defendants have sought in vain to have access to the files of the plaintiff containing approximately 45 charges of discrimination lodged by a chronic complainer named George Brister. There appears to the Court to be no valid reason why these relevant disclosures have not long since been made by the plaintiff to ready these cases for trial, but the plaintiff in these cases continues to hedge and dodge and even evade a July 5, 1977 order of this Court. It is the considered judgment of this Court that the plaintiff has persistently neglected and ignored its duty and obligation under the discovery process of this Court to cooperate with opposing counsel in furnishing relevant information in its files.

The defendants come under the circumstances to seek the imposition of sanctions against the plaintiff and even urge that these suits be dismissed with prejudice. It is difficult for the Court to understand why the plaintiff would wish to withhold relevant information which it has received, and has in its file regarding approximately 45 cases instituted by this same informant under this Act.

The plaintiff in this case on these extensive records has certainly ignored its duty and its obligation to this

Court and to its adversaries in these cases. The informant Brister is no stranger to this Court; on June 11, 1973 as plaintiff in two consolidated actions he refused to answer questions propounded to him and this Court dismissed those cases with prejudice and enjoined Brister under the penalty of contempt from bringing further actions under Title VII of the Civil Rights Act of 1964, unless expressly authorized by a Judge of this Court; yet the plaintiff under such circumstances has continued to receive and process cases for Brister under the Act, but refuses to make disclosure to counsel for the defendants upon interrogatories propounded to them and remaining unanswered as the files in these cases disclose. It is the view of this Court that under the Rules of Civil Procedure that sanctions should thus be imposed upon the plaintiff in these consolidated suits because of its recalcitrant action. The plaintiff has examined the several defenses to defendants motions to dismiss and for an award of attorneys' fees and costs.

The plaintiff says that the United States has not waived its sovereign immunity, that the defendants have not processed their claims as required under the Act. The question directly posed in this case before the Court is as to whether or not the Federal Tort Claims Act constitutes a waiver of sovereign immunity. The Federal Tort Claims Act must be and is strictly construed, if it is to be decided that sovereign immunity is waived in this case. The plaintiff in these cases is not an independent contractor. The Equal Employment Opportunity Commission surely must be and is regarded as a federal agency and is positively not just a recipient of federal aid under one of the Government's programs. The Commission was designed and intended to operate as it does as an agency of the Government and bears all of the responsibility cast upon it in such case by the doctrine of the respondent superior. The Government is responsible for its tortious

conduct just as any private individual would be according to the Federal Tort Claims Act itself. In United States v. Joseph V. Orleans, 96 S.Ct. 1971, the Court had before it a community action agency which had a suit instituted by the child on an outing conducted by the Trumbull Council for Economic Opportunity at an outing when his car collided with a parked truck resulting in his injury. The Council conducting the outing was a contractor with the Commission and not an instrumentality or agency of the United States. The Council was rendered assistance on such occasion by providing a private car which transported the plaintiff on the occasion of his injury. It was doing nothing for or on behalf of the United States and the United States could not possibly be held responsible under such tenuous circumstances under which the Government was even connected with the incident. It is the view of this Court that the Federal Tort Claims Act under the facts and circumstances and inescapable inferences here constitutes and is a waiver of sovereign immunity. The Government has liability in this case just as any private individual would have under the same facts and circumstances. These claims of the defendants are actually recoupments, and are compulsory under the Federal Rules of Civil Procedure and do not require any processing of the Commission as a condition precedent to any entitlement to full benefits under the Act.

These consolidated actions by this plaintiff under these circumstances will both be dismissed with prejudice at the cost of the plaintiff. This Court is not sufficiently advised as to the exact amount of time and attention which the lawyers of the defendants have devoted to this case and therefore must request that the defendants make a showing as to the amount of time and attention which defendants devoted to these cases and the amount of attorneys' fees claimed before this Court but at a time on application made by the defendants for a fixed time for

a hearing to be presented to the Court to enable plaintiff to be present for cross examination. A judgment accordingly may be prepared and presented to this Court for entry within five days under the rules of this Court.

Final Judgment of Dismissal of EEOC v. First National Bank, Cause No. J75-278(C)

Pursuant to (1) the Motion of the defendant First National Bank of Jackson for Dismissal, or, in the Alternative for Summary Judgment, and (2) the Opinion of the Court, based upon the uncontroverted evidence presented in support of the motion rendered pursuant thereto in the consolidated causes of EEOC v. First National Bank of Jackson, Cause No. J75-278(C) and EEOC v. Brookhaven Bank & Trust Company, Cause No. J76-275(C) on November 29, 1977, the complaint on file in the cause of EEOC v. First National Bank of Jackson, Cause No. J75-278(C) is dismissed with prejudice to the plaintiff Equal Employment Opportunity Commission at the cost of the plaintiff Equal Employment Opportunity Commission. The defendant First National Bank of Jackson, as the prevailing party, within the meaning of Title VII of the Civil Rights Act of 1964, is herewith allowed its attorneys' fees and expenses occasioned in the defense of this litigation, the amount of which shall be determined at hearing to be held specifically for that purpose; all as set forth in the Court's Opinion on file in this cause.

To the extent that the Court's Opinion of November 29, 1977, referred in any way to the cause of EEOC v. Brookhaven Bank & Trust Company, Cause No. J76-275(C), those references should be deleted, disregarded and held to be of no effect. These two cases were erroneously consolidated in the first instance and the Court's Opinion of November 29, 1977 reflected a belief

that the same considerations advanced by the defendant First National Bank of Jackson in support of defendant's Motion to Dismiss or in the Alternative for Summary Judgment were equally applicable to the case of EEOC v. Brookhaven Bank & Trust Company, Cause No. J76-275(C), when, in fact, they were not and defendant First National Bank of Jackson's motion was only addressed to the First National Bank of Jackson's case, Cause No. J75-278(C).

The facts, considerations, and rulings set out in the Court's Opinion of November 29, 1977 are, however, fully applicable and effective in the case of EEOC v. First National Bank of Jackson, Cause No. J75-278(C) and it is dismissed as set out above.

ORDERED AND ADJUDGED this 7th day of December, 1977.

Appendix C

In The United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 78-1357

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

FIRST NATIONAL BANK OF JACKSON,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 2, 1980, 5 Cir., 197 , F.2d).
(September 12, 1980)

BEFORE MORGAN, REAVLEY AND HATCHETT, *Circuit Judges.*

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

.....

United States Circuit Judge

Form 704-2

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff

VS.

FIRST NATIONAL BANK OF JACKSON
Defendant

CIVIL ACTION
No. J75-278(C)

ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM OF DEFENDANT FNB

Comes now the defendant, First National Bank of Jackson by and through its counsel of record, and for answer in this cause of action, says:

1.

Defendant denies the allegations of paragraph 1 of the Amended Complaint.

2.

Defendant denies the allegations of paragraph 2 of the Amended Complaint.

3.

Defendant denies the allegation of paragraph 3 of the Amended Complaint, but admits that the Equal Employment Opportunity Commission is an agency of the United States of America.

4.

Defendant admits the allegations of paragraph 4 of the Amended Complaint.

5.

Defendant admits the allegations contained in paragraph 5 of the Amended Complaint.

6.

The defendant denies the allegation contained in paragraph 6 of the Amended Complaint, but does admit that a person named George Brister filed charges with the Equal Employment Opportunity Commission against the defendant more than thirty days prior to the institution of this suit alleging violations of Title VII by the defendant but the defendant alleges, on information and belief, that the charge was instituted by Brister maliciously and for ulterior motive as part and parcel of and pursuant to a conspiracy between the Equal Employment Opportunity Commission and certain of its employees and Brister for the purpose of defrauding, harassing and vexing the defendant. Brister, upon information and belief, is a persistent filer of charges with the Equal Employment Opportunity Commission for all sorts of claimed discrimination. Brister, on information and belief, has made it a practice to file applications for employment with numerous employers where he had no good faith intention of seeking employment or becoming employed. Brister's tendency to file such charges upon such bases and the number, frequency and pattern of such charges are well known to the plaintiff, Equal Employment Opportunity Commission and certain of its employees who actively,

maliciously and for ulterior motive procured the filing of the charge by Brister, assisted and encouraged Brister in the formulation and execution of a plan to defraud, vex and harass the defendant and other employers within the jurisdiction of the Jackson Mississippi District Office of the Equal Employment Opportunity Commission. The Equal Employment Opportunity Commission and its employees maliciously and for ulterior motives continued processing of the charge after discovery of its true nature. The defendant alleges that the existence and execution of the conspiracy has redounded to the prejudice of this defendant and other employers who have been the victims of all such unlawfully conceived, groundless, vexatious and fraudulent charges. The charging party Brister, aided and abetted by the plaintiff Commission and certain of its employees has, on numerous occasions, recovered large sums of money from employers as a result of these irresponsible, groundless, vexatious and fraudulent charges. Even now the plaintiff Commission with the aid and assistance of Brister and in pursuance of the conspiracy herein before mentioned brings this action against this defendant praying that Brister be awarded monetary compensation as a result of this action when, clearly, there was no discrimination involved in the defendant's failure to hire Brister. The charge of Brister is the sole and only foundation for suit against this defendant. The plaintiff has maliciously and for ulterior motives brought this suit against the defendant where there was no probable cause all to the detriment, prejudice and damage of the defendant.

7.

The Defendant denies the allegations contained in paragraph 7 of the Amended Complaint.

8.

The Defendant denies the allegations contained in paragraph 8 of the Amended Complaint.

9.

The Defendant denies each and every paragraph in the prayer for relief section of the Amended Complaint and further denies that the Commission or any other person is entitled to any relief whatsoever including, but not limited to, those matters prayed for in the prayer section of the Amended Complaint.

AFFIRMATIVE DEFENSES

1.

The plaintiff failed to fulfill the jurisdictional prerequisites to the filing of this suit.

(a) There was no adequate service of the charge.

(b) There was no adequate investigation of the charge.

(c) There was no adequate determination of reasonable cause.

(d) There was no good faith effort at conciliation.

(e) There was no notice to the defendant of the failure of conciliation.

(f) The defendant was deprived of the opportunity for good faith conciliation.

2.

The plaintiff fails to state a claim upon which relief may be granted to the extent that the Amended Complaint alleges:

(a) ". . . . and by otherwise discriminating against black persons with respect to their terms, conditions or privileges of employment; . . . ."

3.

The defendant expressly pleads all applicable statutes of limitation. More particularly:

(a) This action is barred by the terms and provisions of 42 USC ¶2000e-5; such suit not having been filed within 180 days from the filing of the charge as required by the statute.

(b) The action is barred by §15-1-33 Mississippi Code of 1972 annotated.

4.

The Commission has no statutory authority to institute suit for the benefit of other persons. Such persons, if there be such persons, have the right to intervene in the suit if they desire. To the extent that such persons are attempted to be made beneficiaries of this suit should be dismissed.

5.

The defendant alleges that a person named George Brister filed charges with the EEOC against the defendant more than thirty days prior to the institution of this

law suit alleging violations of Title VII by the defendant but the defendant alleges, on information and belief, that the charge was instituted by Brister maliciously and for ulterior motive as part and parcel of and pursuant to a conspiracy between the Equal Employment Opportunity Commission and certain of its employees and Brister for the purpose of defrauding, harassing and vexing the defendant. Brister, upon information and belief, is a persistent filer of charges with the Equal Employment Opportunity Commission for all sorts of claimed discrimination. Brister, on information and belief, has made it a practice to file applications for employment with numerous employers where he had no good faith intention of seeking employment or becoming employed. Brister's tendency to file such charges upon such bases and the number, frequency and pattern of such charges are well known to the plaintiff, Equal Employment Opportunity Commission and certain of its employees who actively, maliciously and for ulterior motive procured the filing of the charge by Brister, assisted and encouraged Brister in the formulation and execution of a plan to defraud, vex and harass the defendant and other employers within the jurisdiction of the Jackson Mississippi District Office of the Equal Employment Opportunity Commission. The Equal Employment Opportunity Commission and its employees maliciously and for ulterior motives continued processing of the charge after discovery of its true nature. The defendant alleges that the existence and execution of the conspiracy has redounded to the prejudice of this defendant and other employers who have been the victims of all such unlawfully conceived, groundless, vexatious and fraudulent charges. The charging party, Brister, aided and abetted by the plaintiff Commission and certain of its employees has, on numerous occasions, recovered large sums of money from employers as a result of these irresponsible, groundless. vexatious and fraudulent charges. Even now the plaintiff Commission with the aid

and assistance of Brister and in pursuance of the conspiracy hereinbefore mentioned brings this action against this defendant praying that Brister be awarded monetary compensation as a result of this action when, clearly, there was no discrimination involved in the defendant's failure to hire Brister. The charge of Brister is the sole and only foundation for suit against this defendant. The plaintiff has maliciously and for ulterior motives brought this suit against the defendant where there was no probable cause all to the detriment, prejudice and damage of the defendant.

COUNTERCLAIM

1.

The Court's jurisdiction of this counterclaim is ancillary to the jurisdiction of the Court over the action of the Plaintiff and pursuant to 28 USC §2674 et seq. and 28 USC §1346.

2.

The defendant alleges and adopts the allegations of paragraph 6 of the Answer and paragraph 5 of the Affirmative Defenses as a counterclaim against the plaintiff Counterclaim defendant in this cause and makes the allegations thereof, a part and parcel of this counterclaim as if fully and completely copied herein.

WHEREFORE, the defendant respectfully prays that this Court:

(a) Dismiss the Complaint at the cost of the Plaintiff EEOC.

(b) Grant a permanent injunction enjoining the plaintiff, its officers, agents, employees, and all persons in active concert or participation with it from filing, procuring, maintaining, processing, investigating, conciliating and litigating upon charges filed by George Brister or any other person as part and parcel of and pursuant to a conspiracy between the plaintiff and Brister and any other person to defraud, harass and vex the defendant or from engaging in any practice which suggests, procures, maintains, processes, investigates, conciliates or litigates upon any charges which vex and harass this defendant or any other employer.

(c) That the plaintiff be ordered to cease and desist from its abetting, encouraging and conspiring with George Brister or any other person in the institution, processing, maintenance, investigation, conciliation or litigation of vexatious, harassing, groundless and fraudulent charges.

(d) Grant such further relief as the Court deems necessary and proper.

(e) Award the defendant compensatory damages suffered by it for damages occasioned by the bringing of such charges against it and defendant's being required to defend such baseless and malicious allegations.

(f) Award the defendant its costs, expenses and attorneys' fees in this action.

FIRST NATIONAL BANK OF JACKSON

By:
FUSELIER, OTT, MCKEE & FLOWERS
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

M. Curtiss McKee
Counsel For Defendant

CERTIFICATE OF SERVICE

I, M. Curtiss McKee, of counsel for defendants in the above entitled action, hereby certify that on the 5th day of August, 1976, I served copies of the attached upon the following:

ABNER W. SIBAL, General Counsel
WILLIAM L. ROBINSON, Associate General Counsel
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 "E" Street, N.W.
Washington, D.C. 20506

EARL HARPER, JR., Acting Regional Attorney
ROGER J. MARTINSON, Associate Regional Attorney
LAVERNE S. TISDALE, Assistant Regional Attorney
MAUREEN G. MALONE, Trial Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ATLANTA REGIONAL LITIGATION CENTER
1389 Peachtree Street, N.E., Suite 101
Atlanta, Georgia 30309

by depositing a copy to each of them in the United States mail, postpaid, addressed to them at the above addresses.

M. CURTISS MCKEE

FUSELIER, OTT, MCKEE & FLOWERS
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201